IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ROBERT COX,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. **00-2027**
	)	
SHELBY STATE COMMUNITY COLLEGE, STATE OF TENNESSEE, TENNESSEE BOARD OF REGENTS, FLOYD AMANN, Individually and in his official capacity,	)	
	)	
Defendants.	)	

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Before the court is the motion of Defendants Shelby State Community College, State of Tennessee, Tennessee Board of Regents, and Floyd Amann ("Defendants") for summary judgment. Plaintiff Robert Cox ("Plaintiff") alleges that Defendants unlawfully retaliated against him in violation of section 704(a) of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e et seq. Plaintiff further contends that Defendants have violated 42 U.S.C. § 1983 and the First Amendment to the United States Constitution.[1] For the reasons stated herein, the Court denies Defendants' motion for summary judgment.

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[1]Plaintiff also alleged violations of his Fourteenth Amendment due process rights and of 42 U.S.C. § 1981. Those claims have already been dismissed. See Cox v. Shelby State Cmty. Coll., 48 Fed.Appx. 500, 509 (6th Cir. 2002).

I. Background Facts

Plaintiff, an African-American man, was an employee of Shelby State Community College ("Shelby State") for more than twenty-five years. At all times relevant to this action, Plaintiff was employed by Shelby State.

During the course of his employment, Plaintiff filed several complaints of race- and gender-based discrimination with the Affirmative Action Office ("AAO") at Shelby State and with the Equal Employment Opportunity Commission ("EEOC") against various officials at Shelby State. Plaintiff alleges that because he filed complaints about race and sex discrimination, he was targeted for removal from his position as an instructor and for termination from Shelby State.

On or about August 1997, Plaintiff, then a tenured professor of psychology, was removed from the classroom and assigned to the school library as a library assistant. Shirley Jennings, then Vice President for Academic and Student Affairs, informed Plaintiff of the suspension of his teaching schedule in a memorandum in which she referred to Plaintiff's race and gender discrimination complaints as part of the material presented to her about Plaintiff.

Plaintiff contends that he was subjected to harassment, humiliation, and embarrassment to which other professors were not subjected.

On or about November 4, 1998, more than one year from the time Plaintiff was removed from the classroom, charges were brought against him by Defendants Floyd Amann and the Tennessee Board of Regents. Plaintiff asserts that these charges were filed under the direction of Amann, as part of Amann's plan to remove Plaintiff from the college.

On January 21, 1999, Defendants began a hearing, resulting in a vote to terminate Plaintiff's employment. Defendants terminated Plaintiff on April 30, 1999. At the termination hearing, the

former Affirmative Action Officer for Shelby State, Phyllis Montgomery, was called as a witness and testified regarding Plaintiff's discrimination complaints for use as evidence in support of his termination.

On January 12, 2000, after receiving a right to sue notice from the EEOC, Plaintiff commenced this suit. Plaintiff filed an amended complaint on May 25, 2000. The Court has jurisdiction under 28 U.S.C. § 1331. Plaintiff asserts that Defendants' actions in bringing charges against him and subsequently terminating him resulted from unlawful discriminatory practices. Specifically, Plaintiff contends that the use of his discrimination complaints against him in this manner was a retaliatory act that violated Title VII and his First Amendment rights. On July 3, 2003, Defendants filed this motion for summary judgment, arguing (1) that Plaintiff cannot establish a causal connection between his allegedly protected activity and his termination and (2) that Plaintiff's First Amendment rights were not violated because his speech did not involve a matter of public concern.

II. Legal Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In other words, summary judgment is appropriately granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The party moving for summary judgment may satisfy its initial burden of proving the absence

of a genuine issue of material fact by showing that there is a lack of evidence to support the nonmoving party's case. Id. at 325. This in turn may be accomplished by submitting affirmative evidence negating an essential element of the nonmoving party's claim, or by attacking the opponent's evidence to show why it does not support a judgment for the nonmoving party. 10a Charles A. Wright et al., Federal Practice and Procedure § 2727, at 35 (2d ed. Supp. 1996).

Facts must be presented to the court for evaluation. Kalamazoo River Study Group v. Rockwell Int'l, 171 F.3d 1065, 1068 (6th Cir. 1998). The court may consider any material that would be admissible at trial. 10a Charles A. Wright et al., Federal Practice and Procedure § 2721, at 40 (2d ed. 1983). Although hearsay evidence may not be considered on a motion for summary judgment, Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp., 176 F.3d 921, 927 (6th Cir. 1999), evidentiary materials presented to avoid summary judgment otherwise need not be in a form that would be admissible at trial. Celotex, 477 U.S. at 324; Thaddeus-X v. Blatter, 175 F.3d 378, 400 (6th Cir. 1999).

In evaluating a motion for summary judgment, all the evidence and facts must be viewed in a light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Walbourn v. Erie County Care Facility, 150 F.3d 584, 588 (6th Cir. 1998). Justifiable inferences based on facts are also to be drawn in favor of the non-movant. Kalamazoo River, 171 F.3d at 1068.

Once a properly supported motion for summary judgment has been made, the "adverse party may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A genuine issue for trial exists if the evidence would permit a reasonable jury to return a verdict for the non-moving party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To avoid summary judgment, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586.

III. Analysis

A. Title VII Retaliation Claim

Section 704(a), Title VII's retaliation provision, states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). "Under Title VII, an employee is protected against employer retaliation for opposing any practice that the employee reasonably believes to be a violation of Title VII." Johnson v. Univ. of Cincinnati, 215 F.3d 561, 579 (6th Cir. 2000) (denying summary judgment on claim of retaliation for plaintiff's advocacy against discrimination by defendant). In the Sixth Circuit, a plaintiff makes out a prima facie case of unlawful retaliation by proving that (1) he engaged in activity protected by Title VII, (2) his exercise of protected rights was known to the defendant, (3) the defendant thereafter took an adverse employment action against the plaintiff, or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor, and (4) there was a causal connection between the protected activity and the adverse employment action or harassment. Id. at 578. A causal connection is shown when the plaintiff produces sufficient evidence from which an inference could be drawn that the adverse action would not have been taken had the plaintiff not engaged in protected activity. Nguyen v. City of Cleveland, 229 F.3d 559, 563 (6th Cir. 2000)

(affirming district court's holding that plaintiff produced no evidence to support an inference that defendant's refusal to promote him was in retaliation for EEOC charges that he filed against defendant). A causal connection can be shown through direct evidence or through knowledge on the part of the defendant plus a closeness in time that creates an inference of causation. See Johnson, 215 F.3d at 582; Parnell v. West, No. 95-2131, 1997 WL 271751, at **2 (6th Cir. May 21, 1997).

Once the plaintiff proves the prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Johnson, 215 F.3d at 578. To succeed, the plaintiff must then demonstrate that the defendant's articulated reason was not the true reason for the adverse employment action but was instead a pretext for discrimination. Id. at 578-79. See also Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792-93 (6th Cir. 2000) (same in harassment context).

The Court first asks whether Plaintiff alleged sufficient facts to make out a prima facie case of unlawful retaliation. First, Plaintiff engaged in activity protected by Title VII when he filed complaints of race and sex discrimination with Defendants' AAO and later with the EEOC. See Johnson, 215 F.3d at 579 (listing as an example of protected conduct "complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices"). Second, Defendants necessarily knew of this exercise of protected rights because the initial complaints were filed directly with one of Defendants' agencies, the AAO at Shelby State. Third, Defendants thereafter took an adverse employment action against Plaintiff when they removed Plaintiff from his teaching position and later terminated him. Both actions occurred after Plaintiff filed his discrimination complaints.

Fourth, Plaintiff has presented sufficient evidence to show a genuine issue of material fact as to a causal connection. Defendants argue only that Plaintiff's discrimination complaints were not

close enough in time to any adverse employment action so as to show a causal connection. Lack of temporal proximity, however, is not dispositive when other evidence is present, as it is here. First, a memorandum that Plaintiff received from Ms. Jennings stated that Plaintiff's "long history of filing racial and gender discrimination lawsuits" was part of the material "presented" to her when she decided to suspend Plaintiff's teaching schedule in the fall of 1997. (Memorandum from Shirley Jennings to Robert Cox of 8/7/97.) Second, Ms. Montgomery, then the Affirmative Action Officer for Shelby State and the person with whom Plaintiff had filed his discrimination complaints, was called as a witness by Defendants in the termination hearing. Ms. Montgomery testified about Plaintiff's discrimination complaints, and Plaintiff alleges that he was called upon to defend the substance of those complaints during his termination hearing. Transcripts show that the discrimination complaints were a subject of discussion at the hearing. (See, e.g., Hearing In Re Robert Cox, at 1915-16, 1918.) Third, in the final report submitted to Defendant Amann after the termination hearing, the committee listed Plaintiff's complaints to the administration as one of the findings against Plaintiff and upon which the committee found good cause for termination. (Final Report to the President from the Formal Committee for the Termination Cause Hearings Against Mr. Robert Cox of 4/26/99 ("Final Report").) These facts present direct evidence of a causal connection. Also, contrary to Defendants' assertions, temporal proximity can be found in the use of Plaintiff's complaints against him at his termination hearing. Plaintiff has presented sufficient facts on which to show a genuine issue of material fact on his prima facie case.

Defendants articulated a legitimate nondiscriminatory reason that satisfies their responsive burden. In the Final Report, the termination committee listed four grounds for its recommendation that Defendant Amann terminate Plaintiff: (1) "Incompetence or dishonesty in teaching or research;" (2) "Willful failure to perform the duties and responsibilities for which the faculty was employed or refusal or continued failure to comply with the policies of the Board, institution, [or] department, to carry out specific assignments when such policies or assignments are reasonable and nondiscriminatory;" (3) "Capricious disregard of accepted standards of professional conduct;" and

(4) "Failure to maintain the level of professional excellence and ability demonstrated by other members of the faculty in the department." (Id.) Each of those grounds is an adequate cause for termination of tenure according to the Tennessee Board of Regents' policies. (Tennessee Bd. of Regents Policy No. 5:02:03:00, Academic Freedom, Responsibility and Tenure, at 15-16.) In addition to Plaintiff's complaints to the administration, the committee listed several other reasons for finding that Plaintiff's behavior met the standards for each adequate cause ground. They include: an alleged failure to comply with the policies of the Americans with Disabilities Act by denying a student a requested accommodation, using "highly insulting and derogatory terms in addressing his colleagues," and being the recipient of "more complaints and appeals...than the committee can ignore." (Final Report.) Defendants have therefore articulated several legitimate nondiscriminatory reasons for the adverse employment actions taken against Plaintiff.

Plaintiff, however, has produced sufficient evidence to show a genuine issue of material fact as to whether Defendants' articulated reasons are merely a pretext for discrimination. As discussed above, Plaintiff has produced documentary and other evidence showing a direct relationship between his complaints of discrimination and his ultimate termination: the memorandum from Ms. Jennings, the testimony of Ms. Montgomery, and the final report of the termination committee. At the summary judgment stage, these allegations are strong enough to show a genuine issue of material fact as to pretext. Therefore, the Court denies Defendants' motion for summary judgment on this claim.

B. First Amendment Claim

A state cannot condition government employment on a basis that infringes an employee's constitutionally protected freedom of speech. See Connick v. Myers, 461 U.S. 138, 142 (1982). In the Sixth Circuit's most recent discussion of this issue, the court combined the United States Supreme Court's decisions in Connick, Pickering v. Board of Education, 391 U.S. 563 (1968), and

Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), to produce a three-step analysis:

> First, a court must ascertain whether the relevant speech addressed a matter of public concern. If the answer is yes, then the court must balance the interests of the public employee, "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Finally, the court must determine whether the employee's speech was a substantial or motivating factor in the employer's decision to take the adverse employment action against the employee.

Rodgers v. Banks, No. 01-4034, 2003 WL 22135977, at *5 (6th Cir. Sept. 17, 2003) (quoting Pickering, 391 U.S. at 568) (reversing grant of summary judgment to defendant on plaintiff's First Amendment claim when plaintiff's speech concerned patient care at state mental hospital, defendant showed no evidence of workplace disruption that could outweigh plaintiff's interests in free speech, and parties admitted that speech at least played a role in the decision to terminate plaintiff).

In the first step, the court considers the "point or focus" of the speech in question and whether that point "'relates to any matter of political, social, or other concern to the community.'" Id. at *9 (quoting Connick, 461 U.S. at 146). The entirety of the plaintiff's speech need not be of public concern to be constitutionally protected; "mixed speech," in which at least some portion of the speech is on a matter of public concern, is sufficient. See Banks v. Wolfe County Bd. of Educ., 330 F.3d 888, 894 (6th Cir. 2003). Conversely, when the speech concerns solely the speaker's personal interest or internal personnel disputes, the speech is not constitutionally protected. See Connick, 461 U.S. at 147; Rodgers, 2003 WL 22135977, at *6. Whether the speech is constitutionally protected is a question of law for the court. See Brandenburg v. Hous. Auth. of Irvine, 253 F.3d 891, 897 (6th Cir. 2001).

Plaintiff alleges that his First Amendment rights were violated when his complaints of race and sex discrimination were used against him in both his reduction in teaching responsibilities and his termination. Precedent clearly holds that speech about discrimination is of public concern. See Connick, 461 U.S. at 148 n.8 (describing race discrimination as "a matter inherently of public concern"); Parks v. City of Chattanooga, No. 01-6543, 2003 WL 21674749, at *4 (6th Cir. Jul. 16, 2003) (police officer's letters to supervisors were on matter of public concern because they addressed lack of minority representation in the department, gave one potential solution to that problem, and made accusations of race discrimination against two supervisors); Perry v. McGinnis, 209 F.3d 597, 608 (6th Cir. 2000). Even if Plaintiff's discrimination complaints also concerned his own employment situation at Shelby State, that part of his speech did involve discrimination is sufficient under the "mixed speech" cases to render it constitutionally protected. See Warren v. Ohio Dept. of Pub. Safety, No. 00-3560, 2001 WL 1216979, at **6 (6th Cir. Oct. 3, 2001) ("Allegations of racial and sexual discrimination are inherently matters of public concern even if they are tied to personal employment disputes."). Plaintiff thus meets the first prong of the analysis.

The Court next balances the employee's interests in freedom of speech with the government's interests as an employer.

> "[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency."

Connick, 461 U.S. at 151 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring)). Facts for a court to consider include whether the employee's speech impaired discipline by supervisors, caused a detriment to close working relations, undermined the employer's

goal or mission, impeded the employee in the performance of his own duties, or impaired the harmony among co-workers. See Meyers v. City of Cincinnati, 934 F.2d 726 (6th Cir. 1991) (finding no evidence of a legitimate employer interest based on a simple dislike of what plaintiff was understood to have said). The court gives "a great deal of deference" to the employer's opinion in this matter. See Brandenburg, 253 F.3d at 899.

Defendants have presented evidence showing that Plaintiff's behavior as a whole was disruptive to the Shelby State community. The grounds listed in the termination committee's report tend to show that Plaintiff's conduct hindered the effective operations of the college. For example, Plaintiff's alleged refusal to comply with the Americans with Disabilities Act ("ADA") would frustrate the college's mission by impeding the education of its disabled students. Similarly, student and faculty complaints about Plaintiff's demeanor, civility, and language show that Plaintiff impaired the harmony both among co-workers and within the college as a whole. Finally, Plaintiff's failure to follow directions given by his supervisors, in particular by the Vice-President of Academic Affairs, show the detriment that he caused to what should have been close working relations and his noncompliance with the institutional chain of command.

Plaintiff, however, has offered evidence tending to discredit Defendants' interpretations of his behavior. For example, Plaintiff claims that he attempted to comply with the ADA and simply did not choose the specific accommodation requested by the student involved. Plaintiff's evidence is sufficient to show a genuine issue of fact as to the second step of the First Amendment analysis.

In the third step, the plaintiff must show that his speech was a substantial or motivating factor in the defendant's decision to take an adverse employment action against him. Rodgers, 2003 WL 22135977, at *12. If the plaintiff meets that burden, the defendant may then show that it would have made the same decision even in the absence of the protected conduct. Id. This issue is a

determination of fact that should ordinarily be left to the jury to decide. Id.; see also Perry, 209 F.3d at 604 n.4.

Plaintiff presented evidence that his complaints of discrimination were a substantial or motivating factor in Defendants' decision to reduce his teaching responsibilities and terminate him. As described above, this evidence includes the memorandum from Ms. Jennings, the testimony of Ms. Montgomery, the discussion of Plaintiff's complaints at his termination hearing, and the committee's Final Report. Whether Defendants can prove that they would have made the same employment decisions even in the absence of Plaintiff's complaints should be left to the jury to decide. Summary judgment is therefore inappropriate on Plaintiff's First Amendment claim, and Defendants' motion is denied.

IV. Conclusion

Plaintiff has presented sufficient evidence to show a genuine issue of material fact on both his Title VII and First Amendment claims. Therefore, the Court **DENIES** Defendants' motion for summary judgment.

IT IS SO ORDERED this _____ day of _____ 2003.

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BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE